E-FILED 2019 AUG 08 7:09 AM POWESHIEK - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT FOR POWESHIEK COUNTY

STATE OF IOWA,	)	
Plaintiff,	)	
vs.	)	CRIMINAL NO. FECR010822
CRISTHIAN BAHENA RIVERA,	)	SUPPLEMENTAL MOTION TO SUPPRESS
Defendant.	)	

COMES NOW Defendant by and through counsel and for his application states:

1. Defendant has been charged with the crime of Murder, 1st Degree in violation of Iowa Code Section 707.2.

2. Defendant has previously filed a motion to suppress.

3. Defendant, after the disclosure of additional discovery and analysis of evidence by defense experts, now supplements his motion to suppress to allege the grounds as discussed below.

I. *MIRANDA*/FIFTH AMENDMENT VIOLATION

A. Custodial Interrogation

4. In paragraphs 47 – 63, Bahena has alleged a violation under the United States Constitution Fifth Amendment as guaranteed under *Miranda v. Arizona*. Bahena incorporates by reference the arguments made therein as if made verbatim herein.

5. As stated in paragraphs 47-49 of the Motion to Suppress, a Defendant must be subjected to a custodial interrogation in order for the protections afforded under the Fifth Amendment to be triggered.

6. The issue of whether Bahena was in custody at the time of his interrogation on August 17, 2018 was certainly recognized by law enforcement. The following colloquy occurred upon Bahena's arrival at the Poweshiek County Law Enforcement Center:

Pamela Romero: Christian, you see that exit that you see there – that exit takes you to the street, okay? Uhm, if – sit, please. It's a pleasure, My name is Pamela – Officer Romero.

Unidentified Male (Jeff): I'm Jeff. It's a pleasure. And this door opens, right

Bahena: Okay.

> **Pamela Romero:** So the first thing I want to communicate is that , Christian, uhm, the, the door, the – unopened, without a lock – its not locked, ***THIS IS SIMPLY FOR OUR REPORT THAT WE JUST HAVE YOU HERE [UI] – AND THE EXIT DOOR – SO AT ANY TIME YOU WANT TO LEAVE, THAT YOU DON'T WANT TO TALK – YOU CAN GET UP AND ARE FREE TO LEAVE.*** (emphasis added).

B. Bahena's Fifth Amendment Rights under *Miranda v. Arizona* were Violated as Law Enforcement Did Not Adequately Advise Him of His Rights and Bahena Did Not Give a Voluntary, Knowing and Intelligent Waiver of His *Miranda* Rights.

8. Bahena incorporates paragraphs all preceding paragraphs of this supplemental motion as well as his initial motion to suppress as if set forth fully herein.

9. The State bears the burden of proving a valid *Miranda* waiver. The law entitles Bahena to a pretrial hearing to determine the voluntariness of his confession before the confession is admitted into evidence and offered to the jury. *See Jackson v. Denno*, 378 U.S. 368, 376-77 (1964). The burden is on the prosecution to show compliance with *Miranda's* prophylactic rule. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). *Miranda* suppression hearings do not require any showing of prejudice. Wayne LaFave et. al., 3 CRIM. PROC. § 10.3(c) (2004). "The burden is on the State to prove by a preponderance of the evidence that defendant's waiver of his Miranda rights was made knowingly, voluntarily and intelligently." *State v. King, 492 N.W.2d 211, 214 (Iowa 1992)*. This inquiry has two dimensions: "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine, 475 U.S. 412, 421 (1986).* However, an express waiver is not required. *[Davis, 304 N.W.2d at 435*]. Rather, the validity of the waiver is to be based on particular facts and circumstances surrounding the giving of the Miranda warnings. Id.

10. A court must exclude an incriminating statement obtained on the basis of a waiver, unless the State establishes, by a preponderance of the evidence, that the waiver was voluntarily, knowingly, and intelligently given. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986). "Miranda holds that a defendant may waive the rights effectuated in the warnings only if the waiver is made voluntarily, knowingly and intelligently." *State v. King, 492 N.W.2d 211, 214 (Iowa 1992).*

11. The government's burden to make such a showing "is great," and the court will "indulge every reasonable presumption against waiver of fundamental constitutional rights."

Johnson v. Zerbst, 304 U.S. 458, 464 (1938); *North Carolina v. Butler*, 441 U.S. 369, 373 (1966) (courts "must presume that a defendant did not waive his rights"). To satisfy this burden, the prosecution must prove that the relinquishment of the right was "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception" and that the defendant had a "full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine,* 475 U.S. 412, 421 (1986). Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

12. The validity of a *Miranda* waiver has "two distinct dimensions"--whether the waiver is voluntary and whether it is knowing and intelligent. *Colorado v. Spring*, 479 U.S. 564, 573 (1987) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). The Iowa Supreme Court has given guidance on whether a *Miranda* waiver is knowing and voluntary. It has stated: "[a] number of factors help in determining voluntariness." *State v. Payton, 481 N.W.2d 325, 328 (Iowa 1992).* Among them are: defendant's age; whether defendant had prior experience in the criminal justice system; whether defendant was under the influence of drugs; whether Miranda warnings were given; whether defendant was mentally "subnormal"; whether deception was used; whether defendant showed an ability to understand the questions and respond; the length of time defendant was detained and interrogated; defendant's physical and emotional reaction to interrogation; [and] whether physical punishment, including deprivation of food and sleep, was used. *Id. at 328-29*

13. This review mandates inquiry into an evaluation of "age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare*, 442 U.S. at 725.

14. Other courts throughout the country have dealt with the issue of foreign nationals and their characteristic attributes as they pertain to the reliability of Miranda waivers. *E.g.*, *United States v. Yunis*, 681 F. Supp. 909, 964-66 (D.C. Cir. 1988) ("([a]n individual's foreign background seems especially pertinent to the knowing quality of a waiver."); *United States v. Garibay*, 143 F.3d 534 (9th Cir. 1998) (factors to assess in the totality of the circumstances include: any language difficulties encountered by the foreign national during custodial interrogation; his mental capacity; whether he signed a written waiver; whether the advice of rights was in his native language; whether he appeared to understand those rights; whether he had the assistance of a

translator; whether his rights were explained painstakingly; and whether he had experience with the American criminal justice system.)

15. In making a determination concerning whether a foreign national has knowingly and intelligently waived his *Miranda* rights, courts in other jurisdictions have looked to factors such as the individual's ability to speak English, his experience with the legal process and understanding of the American legal system. Factors such as an ignorance of the American legal system bear heavily on a determination that a waiver was knowing and intelligently made. *See, e.g.*, *United States v. Short*, 790 F.2d 464 (6th Cir. 1986) (statement inadmissible where German defendant had poor command of English, no understanding of U.S. criminal justice system, and no assistance of interpreter); *United States v. Fung*, 780 F. Supp. 115 (E.D.N.Y. 1992) (Chinese-speaking defendant was not properly advised of her rights given her poor language skills, her lack of knowledge of the American legal system and the stress of the situation); *United Status v. Nakhoul*, 596 F. Supp. 1398, 1402 (D. Mass. 1984) (in light of the changed circumstances of the second interrogation, court found that the defendant, whose "understanding of American law, customs, and constitutional rights may be limited, did not understand that the same [*Miranda*] rights could be asserted during questioning by any law officer."); *Gov't of the Canal Zone v. Gomez*, 566 F.2d 1289, 1292 (5th Cir. 1978) (foreign defendant "not familiar with American customs or the Bill of Rights" unable to "knowingly and intelligently waive his right to counsel.")

16. The issues surrounding Mexican nationals and the difficulties they face during interrogations have been discussed in legal treatises. *See* Eugene Briere, "Limited English Speakers and the Miranda Rights", TESOL Quarterly 12: 235-245 (1978); *see also* Flo Messier, "Alien Defendants in Criminal Proceedings: Justice Shrugs," 36 American Criminal Law Review 1395 (1999) ("the meaning of Miranda warnings can be unfathomable to an accused even when read in his native language."). This is because all too often, Mexican nationals are unable to understand their legal rights when facing interrogation.

17. The failure to provide a *Miranda* advisement in the defendant's native language is of itself grounds for potential reversal, where the defendant's grasp of the English language is clearly limited. *See United States v Tsoi Kwan Sang,* 416 F.2d. 306 (5th Cir. 1969) (remanding for further proceedings where the reviewing court expressed "grave doubt" as to Chinese defendant's ability to sufficiently understand his *Miranda* rights in order to waive them). Numerous courts have suppressed the statements of Hispanic defendants where the *Miranda* warning was not adequately conveyed. *See United States v. Garibay*, 143 F.3d 534, 537 (9th Cir. 1998); *United States v. Castorena-Jaime*, 117 F.Supp.2d 1161 (D. Kan. 2000); *United States v. Bejar*, 1995 WL 548771 (N.D.Ill.1995); *United States v. Higareda-Santa Cruz*, 826 F. Supp 355 (D. OR. 1993);

Barcenas v. State, 33 S.W.3d 136 (Ark. 2000); *State v. Santamaria*, 464 So.2d 197 (Fla. Dist. Ct. App. 1985); *State of Ohio v. Ramirez*, 732 N.E.2d 1065 (Ohio Ct. App. 1999); *State v. Lopez*, 476 S.E.2d 227 (W. Va. 1996).

18. In this particular case, the ***Miranda*** advisement was given several hours into the interrogation. The advisement was given by a police officer interpreter and the advisement was incomplete.

19. Where a bilingual law enforcement officer acts as an interpreter, the confession may be suspect. The court will look at which party supplied the interpreter, whether the interpreter had any motive to mislead or distort; the interpreter's qualifications and skill level and whether actions taken subsequent to the conversation were consistent with the statements as translated. *United States v. Martinez-Gaytan*, 213 F. 3d 890, 892 (5th Cir. 2000). In that case, the court remanded the case back for testimony from the officer who acted as the interpreter in order to determine his reliability and evaluate whether the confession was truly voluntary. In this case, the police interpretation of the *Miranda* warning was clearly deficient. For instance at the time Officer Pamela Romero advised Bahena of what was supposed to me his *Miranda* advisement, the following verbatim conversation occurred:

> **Pamela Romero:** What happened because you are an intelligent person, okay? I am going to read your rights [UI] – Right [UI] okay?
>
> **Bahena:** MM-HMM.
>
> **Pamela Romero:** And these rights that – remaining quiet. If you don't want to talk to me, you don't have to do it, do you understand?
>
> **Bahena:** mm-hmm.
>
> **Pamela Romero:** You have the right to an attorney.
>
> **Bahena:** mm-hmm.
>
> **Pamela Romero:** If you can't pay for one, one will be appointed by the state.
>
> **Bahena:** mm-hmm.
>
> **Pamela Romero:** Free of charge. Do you understand what I just told you?
>
> **Bahena:** mm-hmm.

Pamela Romero: Once I have read – have told you this, do you still want to talk to me?

Bahena: mmm – yes.

20. In Miranda v. Arizona, 384 U.S. 471, 478-79, the Supreme Court first pronounced the now well-established rule that, before beginning a custodial interrogation, authorities must advise suspects of certain rights., Specifically, Miranda requires a suspect be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. 384 U.S. at 479.

21. In determining the admissibility of a defendant's inculpatory statements over a Fifth Amendment challenge we apply a two-part test. *State v. Countryman,* 572 N.W.2d 553, 557 (Iowa 1997). "We first determine whether *Miranda* warnings were required and, if so, whether they were properly given. Second, we ascertain whether the statement is voluntary and satisfies due process." *Id. Miranda* warnings are only required if, at the time of police questioning, the suspect is both: 1) in custody, and 2) subject to interrogation. *Berkemer v. McCarty,* 468 U.S. 420, 429, 104 S.Ct. 3138, 3144, 82 L.Ed.2d 317, 328 (1984) ; *accord Countryman,* 572 N.W.2d at 557.

22. Where investigators read or translate *Miranda* rights into the defendant's native language, translations must be adequate to ensure a knowing and intelligent waiver. The courts have repeatedly assailed shoddy translations of *Miranda* warnings. *See, e.g., United States v. Vasquez-Lopez*, 400 F.2d 593, 594 (9th Cir. 1968) (Spanish translation of *Miranda* found inadequate); *People v. Jiminez*, 863 P.2d 981 (Colo. 1993) (waiver was invalid because the word "rights" did not exist in the defendant's native tongue (Kickapoo), his Spanish and English comprehension were extremely limited, and the interpreter did not make an effort to explain the rights in detail); *State of Ohio v. Ramirez*, 732 N.E.2d 1065 (Ohio Ct. App. 1999) (defendant's confession was suppressed because the translation of his *Miranda* rights into Spanish was found to be confusing and incomplete); *State v. Lopez*, 476 S.E.2d 227 (W. Va. 1996) (statement suppressed where interpreter employed by the police struggled to interpret and did not communicate essential portions of the *Miranda* colloquy).

23. It is well-settled that all *Miranda* warnings must "reasonably convey" to a suspect "his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966)]." *Florida v. Powell*, 130 S. Ct. 1195, 1204 (2010).

24. In this case, it is readily apparent that the Spanish-language warning did not meet the requirements. Officer Romero did not advise Bahena of all his *Miranda* rights. They were not a verbatim advise of the rights as required. Moreover, Officer Romero did not receive proper affirmation that Bahena understood the rights. A warning given in Spanish that fails to reasonably convey the government's obligations under *Miranda* is constitutionally infirm. *See United States v. Perez-Lopez*, 348 F.3d 839, 848 (9th Cir. 2003).

25. The *Miranda* warning given by Officer Romero was the only advisement given to Bahena. No English speaking officer attempted to give the warning through an interpreter to insure it was done properly. In short, the interpreter advised Bahena of his rights. No clarification of Bahena's rights were ever attempted by any of the other English speaking officers in the room or involved in the hours-long interrogation.

26. Without a clarification of the insufficient *Miranda* warning and a valid acknowledgement and waiver by Bahena, the statement made by Bahena must be suppressed. Without a subsequent clarification, even a single mistranslated word can be sufficient to render the warning constitutionally inadequate, so that Bahena's "subsequent statements may not be admitted as evidence against him." *United States v. Botello-Rosales,* 728 F.3d 865, 867 *(9th Cir. 2013)* (suppressing statement where Spanish-language warning erroneously used the word "libre," which failed to convey an indigent defendant's right to an attorney without cost); *see also United States v. Perez-Lopez*, 348 F.3d 839, 848 (9th Cir. 2003) ("To be required to 'solicit' the court, in the words of [the Spanish-language] warning, implies the possibility of rejection"); *accord United States v. Higareda-Santa Cruz,* 826 F.Supp. 355, 359-60 (D.Or.1993) (Spanish-language warning of right to 'petition' the court for appointment of counsel invalidated *Miranda* waiver). In short, "[r]egardless of circumstance, a *Miranda* warning must be read and conveyed to all persons clearly and in a manner that is unambiguous." *United States v. San Juan-Cruz,* 314 F.3d 384, 389 (9th Cir. 2002).

II. INVOLUNTARY STATEMENT

27. Bahena incorporates by reference all preceding paragraphs and his previously filed motion to suppress. Specifically, the violations contained in paragraphs 47 – 75 of the Motion to Suppress on file are incorporated by their reference.

28. In this matter officers created an environment where Bahena's statement to law enforcement can only be characterized as involuntary.

29. Officers in this matter isolated Bahena for several hours. He was placed alone in a small interrogation room alone for the duration of this time. During this time, he was confronted by as many as six different law enforcement officers. The confrontational nature of the interrogation continued with a slow crescendo from all officers until it made it apparent to Bahena that the only course of action to take was to offer incriminating statements on himself despite repeatedly denying involvement. The officers' utilization of this technique is known as the Reid Technique and the officers in this matter are trained and experienced in this technique.

30. Bahena was obviously sleep deprived during his interrogation. During the interrogation Bahena even fell asleep on more than one occasion. Sleep deprivation techniques used by the officers caused Bahena's statement to be involuntary.

31. Research has shown that in wrongful conviction cases, false confessions are implicated in 15%-25% of those cases. . *Gross SR, Shaffer M (2012) Exonerations in the United States 1989 through 2012 (Natl. Registry Exonerations Report). Available at www.law.umich.edu/special/exoneration/documents/exonerations_us_1989_2012_full_report.pdf. Accessed October 30, 2015*.

32. Studies have also shown that as many as 17% of interrogations occur during typical sleep hours and a majority of false confessions occur following interrogations that last a lengthy period of time. *Kassin SM, et al. (2007) Police interviewing and interrogation: A self-report survey of police practices and beliefs. Law Hum Behav 31(4):381–400. Drizin S, Leo R (2004) The problem of false confessions in the post-DNA world. North Carol Law Rev 82:891–1007..*

33. Recent research has found that it has become increasingly evident that the interrogation of the unrested, possibly sleep-deprived, suspects is not out of the ordinary and may even be commonplace. *Frenda, Steven J, et al. 2015, Sleep Deprivation and False Confessions, www.pnas.org.*

34. In this matter, Bahena was obviously sleep-deprived and open to suggestion. Statements made by him were as a result of coercive and suggestive questioning leading to false and misleading statements based on unduly suggestive questioning techniques rendering the statements involuntary.

III. VIOLATIONS UNDER IOWA CONSTITUTION

35. As state previously in paragraphs 47 – 75, Bahena has alleged violations of *Miranda v. Arizona* and the Fifth Amendment of the United States Constitution as well as violation of his Due Process Rights under the Fourteenth Amendment of the United States Constitution.

36. Bahena incorporates paragraphs 47-75 as if fully set forth verbatim herein.

37. Article I, Section 10 of the Iowa Constitution states:

> In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him, to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and, to have the assistance of counsel.

38. Article I, Section 9 of the Iowa Constitution states:

> The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.

39. All arguments raised herein under the United States Constitution are incorporated by reference and are equally applicable under the Iowa Constitution.

IV. VIOLATION OF IOWA CODE SECTION 804.20

40. Iowa Code Section 804.20 provides:

> Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of the person's family or an attorney of the person's choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

41. The Iowa Supreme Court has interpreted the applicability of this Code Section 804.20. It has stated, "In context, we conclude Iowa Code section 804.20 applies to the period after arrest but prior to the formal commencement of criminal charges." *State v. Robinson, 859 N.W.2d 464, 487 (Iowa 2015).*

42. Several hours into the interrogation, officers made the decision to arrest Bahena. It was at this time that officers decided to first contact immigration officials. The following conversation occurred in the Poweshiek County Jail:

Unidentified Male 2 (UM2)
Pamela Romero (PR)
Cristhian Bahena Rivera (CBR)
Unidentified Male 5 (UM5)
Unidentified Male 6 (UM6)

UM2: [UI] –THINK—THINK ABOUT WHAT YOU TOLD US--
PR: OKAY.
UM2: AND WE ARE GOING TO TALK A LITTLE.
PR: MM-HMM.
UM2: THINK ABOUT WHAT YOU HAVE TOLD US.
CBR: OKAY.
UM2: I DON'T KNOW IF YOU ARE GOING TO—MAYBE THIS IS THE ONLY OPPORTUNITY—
CBR: MM-HMM.
UM2: TO TELL US WHAT HAPPENED.
CBR: WELL I—I AM TELLING YOU I DIDN'T DO ANYTHING TO HER. I DIDN'T DO ANYTHING TO HER, YEAH—I AM SURE OF THAT.
UM2: OKAY WELL—
PR: TAKE YOUR TIME.

[NO AUDIO WITH CONVERSATION IN ROOM UNTIL 1:02:42]

UM2: HOW ARE YOU? TIRED?
CBR: A LITTLE.

[UI NOISES IN BACKROUND]

UM2: SOMETHING ELSE? YOU NEED MORE TIME TO THINK?
CBR: YEAH.

UM2: WHAT DO YOU WANT TO TELL ME?
CBR: THAT I DIDN'T DO ANYTHING TO HER.
UM2: OKAY.
UM5: WHAT WAS THAT?
UM2: THAT HE DIDN'T—THAT HE DIDN'T DO ANYTHING TO HER.
UM5: OKAY—
UM2: SO—
UM5: LET HIM KNOW HE'S GONNA UH, GONNA PUT HIM ON SPEAKER SO HE CAN TALK TO SOMEBODY—PROBABLY JUST GONNA HAND THE PHONE OVER TO HIM SO HE CAN TALK TO SOMEBODY.
UM2: HE IS GOING TO PASS THE PHONE OVER TO YOU SO YOU CAN TALK TO SOMEONE.

[RINGING/TONES]

UM5: OH I DIDN'T WANT UH—[UI]—NO SIGNAL ON HERE. HEY I'M GONNA HAND THE PHONE OVER TO YOU.
UM6: THAT'S FINE.
UM5: ALL RIGHT.
CBR: IT'S IN SPANISH?
UM2: YEAH.
UM5: WHAT?
UM6: YOU'RE CRISTHIAN?
CBR: YES.
UM6: [UI]
CBR: YES.
UM6: WHAT IS YOUR NAME?
CBR: CRISTHIAN BAHENA RIVERA.
UM6: [UI]
CBR: FROM MEXICO.
UM6: [UI]—
CBR: NO.
UM6: [UI]—
CBR: YES.

UM6: [UI]—

CBR: I DON'T KNOW—SEVEN YEARS.

UM6: [UI]

CBR: YEAH.

UM6: [UI]

CBR: UH, GUERRERO.

UM6: [UI]

CBR: YES.

UM6: [UI]

CBR: NO.

UM6: [UI]

CBR: YEAH.

UM6: [UI]

CBR: MM-HMM.

UM6: [UI]

CBR: OKAY.

UM6: [UI]

CBR: OKAY. OH—OKAY. MM-HMM.

UM6: [UI]

UM5: WHAT'S THAT? ALL RIGHT, YOU NEED ANYTHING ELSE—MORE? YEAH, YOU CAN—HELLO—

UM6: [UI]

UM5: YEP. HELLO?

UM6: [UI]

UM5: OKAY.

UM6: [UI]

UM5: OKAY. UH NO, WE HAVE TO GET HIM OVER TO TAMA--I THINK.

UM6: [UI]

UM5: YEAH 'CUZ THE—THEY DON'T HOLD FEDERAL UP HERE.

UM6: [UI]

UM5: OKAY.

UM6: [UI]

UM5: OKAY WELL WE'LL GET HIM TRANSPORTED OVER.

UM6: [UI]

UM5: ALL RIGHT, APPRECIATE IT.

UM6: [UI]

UM5: THANKS. SO HE SPEAKS NO ENGLISH [UI]—**ALL RIGHT. UH, JUST LET HIM KNOW THAT WE'LL ALSO SEND SOMEONE HERE IN A MINUTE TO TAKE HIM IN BUT WE'RE GONNA TAKE HIM IN CUSTODY SO I DON'T KNOW HOW YOU'RE GONNA SAY THAT [UI]—** (emphasis added)

UM2: SOMEONE IS GOING TO TAKE YOU—

CBR: MM-HMM.

UM2: UH TO TALK TO THE—WHERE--TO TAMA—

CBR: YES.

UM2: UH, TAKE YOU WITH TAMA.

UM5: UHM, I DON'T THINK WE'VE GONE THROUGH HIS POCKETS OR ANYTHING SO—

UM2: DO YOU HAVE SOME—THINGS IN YOUR POCKETS?

CBR: MY TELEPHONE.

UM2: JUST YOUR TELEPHONE?

CBR: YES.

UM2: NOTHING ELSE?

CBR: YES. [UI]—

UM2: HE'S SAYING HE JUST HAS HIS PHONE.

UM5: ALL RIGHT. CAN YOU STAND UP?

UM2: CAN YOU—

CBR: YEAH.

UM2: STAND UP—HE'S GOING TO CHECK, YEAH?

UM5: OKAY. CAN YOU ASK HIM IF THERE'S ANYTHING IN HIS CARS THAT SHOULD NOT BE IN THE CARS LIKE DRUGS, ANYTHING LIKE THAT.

UM2: ARE THERE THINGS IN YOUR CAR THAT SHOULDN'T BE THERE—

CBR: IN MY CAR?

UM2: DRUGS OR—

CBR: [UI]—

UM2: WEAPONS—

CBR: IN WHICH ONE, THE BLACK ONE OR WHICH ONE?

UM2: IN YOUR CAR.

CBR: IN THE MALIBU?

UM2: THE—THE TWO OF THEM?

CBR: NO.

UM2: THERE'S NOTHING?

CBR: NO.

UM2: DRUGS, WEAPONS—

CBR: NO.

UM2: ILLEGAL THINGS?

CBR: NO.

UM2: NO?

UM5: YOU GOTTA TAKE—OKAY, GOTTA TAKE THIS PHONE.

UM2: HE IS GOING TO TAKE—UH, THEY ARE GOING TO TAKE YOUR TELEPHONE, THAT OKAY?

CBR: MM-HMM.

UM2: AS EVIDENCE, YEAH? UH, QUESTIONS?

CBR: MMM—

UM2: YOU CAN RELAX YEAH, FOR A MOMENT.

CBR: OH WHEN WILL I BE ABLE TO TALK TO A RELATIVE TO LET THEM KNOW THAT—

UM2: UH, NEEDS TO SPEAK WITH UH SOMEBODY [UI]—FAMILY MEMBER OR— (emphasis added)

UM5: UH, MAYBE UHM—YEAH MAYBE. UHM, DOES HE UNDERSTAND WHY WE THINK HE HAS KNOWLEDGE OF WHAT HAPPENED OR WHY? DOES HE UNDERSTAND THAT?

UM2: YOU UNDERSTAND WHY—

CBR: YES.

UM2: YOU ARE HERE AND THAT—

CBR: [UI]—

UM2: BECAUSE WE THINK—

CBR: YEAH.

UM2: YOU HAVE INFORMATION REGARDING HER "DESAPARENCIA" [WORD NOT EXIST IN SPANISH].

CBR: YES [UI]—WHEN WILL I BE MOVED, TODAY OR TOMORROW?

UM2: TONIGHT. THIS EVENING. YEAH, HE UNDERSTANDS—

UM5: OKAY.

UM2: HE KNOWS—YEAH.

UM5: OKAY, ALL RIGHT.

V. VIOLATION OF CONSULAR RIGHTS

43. In light of *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), Bahena asserts that the violation of consular treaty obligations following his arrest is relevant to determining the admissibility of his statements. The Vienna Convention on Consular Relations ("VCCR") is a multilateral treaty regulating consular rights, functions and obligations for some 179 nations, including Mexico and the United States. Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77. The United States unconditionally ratified the treaty in 1969; as a result, it became binding on all local and state authorities under the Supremacy Clause of the United States Constitution. U.S. CONST. Art. VI, cl. 2; *Hines v. Davidowitz,* 312 U.S. 52, 62-63 (1941)(a treaty establishing rules governing the rights or privileges of aliens "is the supreme law of the land").

44. Article 36(1)(b) of the VCCR requires that the detaining authorities must advise a foreign national *without delay* of his right to consular notification:

> if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph*.

45. Article 36(1)(c) grants consular officers the right "to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Finally, Article 36(2) provides that local laws and regulations "must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

46. In *Sanchez-Llamas*, the U.S. Supreme Court held that suppression was not a *per se* remedy for an Article 36 violation. *Sanchez-Llamas*, 548 U.S. at 350. However, the Court also found that an Article 36 violation *is* relevant to determining the admissibility of a defendant's statements, and that other more limited pre-trial remedies could be available for the violation standing alone:

> Finally, suppression is not the only means of vindicating Vienna Convention rights. A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police. If he raises an Article 36 violation at trial, a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance.

Id. The Supreme Court's clear recognition of pre-trial remedies is highly pertinent to Bahena's motion to suppress. First, under *Sanchez-Llamas*, a violation of Article 36 obligations is now part of the "totality of the circumstances" inquiry in assessing the voluntariness of custodial statements and, by logical extension, in determining whether a *Miranda* waiver leading to those statements was knowing, intelligent and voluntary. *See Schneckloth*, 412 U.S. at 226 (totality of the circumstances for involuntariness includes whether the accused was advised of his constitutional rights); *Davis*, 384 U.S. at 741 (fact that defendant "was never *effectively* advised of his rights" was a contributing factor in the involuntariness determination) (emphasis added)*; see also United States v. Amano*, 229 F.3d 801, 805 (9th Cir. 2000) (incorporating violation of consular treaty obligations into the totality of the circumstances analysis when assessing the voluntariness of *Miranda* waiver in a foreign national's case).

47. Second, in some circumstances, the Article 36 obligation to inform the detainee of his consular rights "without delay" must attach prior to or during the interrogation; if the advisement could always be delayed until after a statement was obtained, there would *never* be a viable "Article 36 claim" to introduce "as part of a broader challenge to the voluntariness" of those statements. Bahena demonstrates *infra* that he was not informed of Article 36 rights "without delay," despite obvious and early indications of his Mexican nationality.

48. Courts nationwide have now recognized and applied the same broad requirement in a variety of relevant contexts. Some courts have expressly recognized that the broader challenge to involuntariness contemplated by *Sanchez-Llamas* includes challenges to the voluntaries or sufficiency of the defendant's *Miranda* waiver. *See, e.g., Cervantes-Guervara v. State*, 532 SW 3d 827, 835 (Tex. App. 2017)(in case addressing sufficiency of *Miranda* waiver, considering the officers' failure to advise appellant of his right to contact his consulate "as a factor in assessing the voluntariness of appellant's statement in the totality of the circumstances"); *State v. Morales-Mulato*, 744 N.W.2d 679, 686 (Minn. Ct. App. 2008) (for purposes of *Miranda* waiver analysis, holding that the violation of a foreign detainee's rights under article 36 of the Vienna Convention, "may be considered in assessing whether a statement was voluntary, knowing, and intelligent.").

49. Other courts have applied the *Sanchez-Llamas* requirement when assessing the voluntariness of the defendant's subsequent statement. *State v. Banda*, 639 S.E.2d 36, n.11 (S.C. 2006) (interpreting *Sanchez-Llamas* as indicating that a defendant "may successfully move for a *Jackson v. Denno* hearing to suppress a statement by asserting a violation of the consular notification provisions of a treaty, along with other factors indicating the involuntariness of a statement"); *State v. Ramos*, 297 P.3d 1251, 1254 (Okla. Crim. App. 2013) (remanding case on finding that "under *Sanchez-Llamas* an Article 36 violation can be raised as part of a broader challenge to the voluntariness of any statement made to the police and addressed in a *Jackson v. Denno* hearing"); *Anaya-Plasencia v. the State*, 642 S.E.2d 401, 404 (Ga. Ct. App. 2007) (defendant's opportunity to cross-examine interrogating detective regarding failure to provide Article 36 advisement falls under "broader challenge" requirements of *Sanchez-Llamas*); *State v. Cabrera*, 903 A.2d 427, 431 (N.J. Super. Ct. App. Div. 2006) (observing that *Sanchez-Llamas* "made clear" that a defendant can raise an Article 36 claim as part of a broader challenge to voluntariness). Under *Sanchez-Llamas*, therefore, this Court must consider the Article 36 violation as a factor relevant to both categories of involuntariness analysis.

50. It is absolutely apparent that authorities knew Bahena was a Mexican national. Once a vehicle matching the identity of the vehicle driven by Bahena was discovered and stopped two days prior to Bahena's interrogation, officers knew his identity. Bahena was stopped by Poweshiek County Deputy on or about August 18, 2018 in Malcom, Iowa. Bahena was identified by his true identity at that time. Two days later, state and federal authorities descended upon Yarrabee Farms, where they believed Bahena to be employed. With approximately 15 local, state and federal agents, officers blocked driveways and had the proprietors gather all employees of Hispanic descent. Law enforcement then announced to the Hispanic individuals that they were not from "immigration". The Hispanic individuals were then directed to meet in a break room in a building to be identified and provide buccal samples at the direction of law enforcement. Bahena was identified by law enforcement by a photograph taken by the deputy sheriff two days prior on his telephone. Law enforcement, in an attempt to identify Bahena, removed his hat and rubbed his head as if to tousle his hair. Law enforcement then discussed among themselves if this was the individual for which they were looking. They then placed the photo in front of Bahena and asked if he was one in the same person. Bahena confirmed he was. At that point he was requested to travel to Montezuma for questioning and requested to remove his boots and put on his shoes. The initial questioning by law enforcement made it very clear that they were dealing with a Mexican national.

51. Upon information and belief, a second interrogation of another individual, also a Mexican national was being conducted at the same time as the interrogation as Bahena. Thus, even more aggravating is that law enforcement has two Mexican nationals being detained at the same time without being given their consular notification. Exactly how long this other Mexican national was interrogated is unknown. Members of Bahena's family arrived at the Poweshiek County Law Enforcement Center shortly after Bahena and remained there until the early morning hours. The other Mexican national never was released through public entrances.

Rather, it is believed he was escorted out of the law enforcement center through a private exit and given transportation.

52. The obligation to inform a foreign national "without delay" of the right to consular notification and communication attaches whenever a foreigner is "arrested or committed to prison or to custody pending trial or is detained in any other manner." VCCR, art. 36(1)(b). Advisement "without delay" must take place expeditiously, as soon as the arresting authorities determine or suspect the foreign nationality of a person in detention. First, as noted *supra*, the clear implication of *Sanchez-Llamas* is that the obligation to inform the detainee of his consular rights *must* in some circumstances attach prior to or during his interrogation. Those circumstances would necessarily require police knowledge of probable foreign nationality coupled with the holding of the individual in any form of custody. Second, domestic authority supports a functional interpretation of "without delay". The State Department has instructed law enforcement agencies nationwide that:

> There should be no deliberate delay, and notification must occur as soon as reasonably possible under the circumstances. . . . If the identity and foreign nationality of a person are confirmed during a custodial interrogation that precedes booking, consular information should be provided at that time.

U.S. Department of State, CONSULAR NOTIFICATION AND ACCESS 21 (4th ed. August 2016).

53. Where, as here, the police were able to administer a timely *Miranda* warning and were aware of the detained suspect's likely foreign nationality, prompt advisement under Article 36 was "reasonably possible" and hence necessary. Indeed, "the fact that authorities were able to administer *Miranda* warnings to him during the relevant time-frame amply demonstrates that the officers had sufficient means and opportunity to provide him with [Article 36] notification." *U.S. v. Miranda*, 65 F.Supp.2d 1002, 1005 (D. Minn. 1999) *cf*. *Mallory v. United States*, 354 U.S. 449, 455 (1957) (where probable cause existed for an arrest, a six-hour delay in arraignment breached the "without unnecessary delay" requirement of Federal Rules of Criminal Procedure Rule 5 (a)).

54. Furthermore, the State may not argue in response that the Defendant's foreign nationality was not definitively determined by the time of the interrogation; in those circumstances, the State Department has instructed police that a *probability* of foreign citizenship is sufficient to trigger a consular advisement. *Id.* ("If it appears that the person is probably a foreign national, you should provide consular information and treat the person like a foreign national until and unless you confirm that he or she is instead a U.S. citizen"). Moreover, the views of the State Department on the interpretation of the VCCR are entitled to great weight. *See, e.g., Sanchez-Llamas*, 548 U.S. at 355 (reaffirming that "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight" (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)).

55. Furthermore, particularly when its construction does not conflict with domestic procedural rules, the interpretation of Article 36 provided by the International Court of Justice ("ICJ") is entitled to the "'respectful consideration' due an interpretation of an international agreement by an international court." *Sanchez-Llamas*, 548 U.S. at 353; *see also Breard v. Greene*, 523 U.S. 371, 375 (1998); *accord Commonwealth v. Gautreaux*, 458 Mass. 741 (Mass. 2011). According to the ICJ, although the Article 36 obligation to inform the detainee without delay

> is not to be understood as *necessarily* meaning "immediately upon arrest", there is nonetheless a duty upon the arresting authorities to give that information to an arrested person *as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national*.

Avena and Other Mexican Nationals (*Mex. v. U.S.*), 2004 ICJ 128, ¶ 88 (emphasis added); *see also id.* at ¶ 89 (finding an Article 36 violation despite advisement of consular rights 40 hours after arrest, where there were indicia of the arrestee's Mexican nationality "from the time of his initial interrogation").

56. Bahena would have certainly invoked his consular notification and terminated further questioning. As will be discussed below, Bahena, prior to being given the deficient

Miranda warning, he was asking to speak to family. He had desires to seek advice. Bahena has no criminal record in either Mexico or the United States to conceal. His ties to his family in Mexico and his native culture are deep and enduring.

57. Bahena has by **sworn affidavit** that he was not aware of his Article 36 rights, that he would have exercised those rights immediately had he been so informed and that he would have refused to answer further questions until consulting with his consular representatives. Courts routinely accept such affidavits as presumptively valid unless rebutted by other evidence. *See, e.g.*, *United States v. Rangel-Gonzales*, 617 F.2d 529, 531 (9th Cir. 1980) (by means of his own affidavit, appellant "showed he did not know of his right to contact the consular officers [and] that he would have done so had he known"); *Torres v. State*, 120 P.3d 1184, 1187 (Okla. Crim. App. 2005) (requiring that a defendant show "that he did not know he could have contacted his consulate [and] would have done so").

58. It is clear that Bahena would have sought consular advice and support before giving any statement to the police if law enforcement had provided him with a proper advisement of his Article 36 rights. *Consular Notification and Access*, the State Department's comprehensive police training manual on Article 36 requirements, has been distributed to virtually every police department nationwide, is readily available on-line, and includes detailed instructions on the nature of consular assistance and the procedures to be followed when detaining foreigners.[1] Its recommended advisement of Article 36 rights reads:

> As a non-U.S. citizen who is being arrested or detained, you may request that we notify your country's consular officers here in the United States of your situation. You may also communicate with your consular officers. A consular officer may be able to help you obtain legal representation, and may contact your family and visit you in detention, among other things. If you want us to notify your consular officers, you can request this notification now, or at any time in the future. Do you want us to notify your consular officers at this time?

U.S. Dept. of State, CONSULAR NOTIFICATION AND ACCESS (5th ed. Sept. 2018) at 73, *Suggested Statements to Foreign Nationals*.

59. Providing this information to Bahena—a confused, exhausted and vulnerable Mexican national was seeking trustworthy help—would have triggered an invocation of consular notification and a decision to await the consulate's assistance before making any other statements. The State Department manual also provides an expanded discussion of the consular function that the police likely would have relied on in answering any questions from Bahena regarding the purpose of consular notification, such as the fact that a consular officer "may ask to speak with the detained foreign national over the phone . . . to discuss his or her situation and needs . . . and seek to ensure that the foreign national receives a fair trial". *Id*. at 30. Upon receiving a full explanation of its immediate benefits, it is even more certain that Bahena would have seized the opportunity to invoke consular notification and then await the assistance of the Mexican Consulate.

60. As an immigrant with a very limited Mexican education, Bahena was wholly unfamiliar with U.S. criminal justice system. He failed to understand the *Miranda* warning provided to him. The *Miranda* warning provided was deficient. These facts provide compelling support for Bahena's position that had he been notified of his right to consular assistance, he could not have given any statement before first consulting with representatives from the Mexican Consulate.

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